Master the Art

Adding Value During Jury Selection at Every Level

By Brett A. Tarver

One of the most mysterious and difficult to master aspects of trial is the art of conducting voir dire and selecting a jury. The opportunities to gain experience selecting a jury continue to dwindle as the number of jury trials diminishes over time. Many associates, young lawyers, or lawyers who have minimal trial experience may feel that they have little value to add during voir dire and the selection of a jury. This column seeks to provide brief tips on how less-experienced trial lawyers—whether young or not—can add value to the jury selection process in a variety of ways.

Before Voir Dire

Before voir dire and jury selection begin, a lawyer who is new to jury selection can add value by mastering the rules governing jury selection in the jurisdiction and learning the trial judge's preferences for conducting jury selection. Every jurisdiction has different rules on how jury selection can be conducted. Some allow attorneys to question potential jurors while other jurisdictions do not. Some allow the use of a juror questionnaire before selection begins while others strictly prohibit the use of a questionnaire. Even in jurisdictions where the rules seem to allow attorneys to question potential jurors or juror questionnaires, many still leave room for the trial judge's discretion on how voir dire will be conducted and what language, if any, will be allowed in a juror questionnaire. Both of these elements will play a significant role in the trial team's development of a jury selection strategy and govern how the team will both weed out unfavorable jurors and insulate favorable jurors from challenges for cause. Having a member of the team know the jurisdiction's rules and the judge's preferences from the start will help the entire team develop a successful selection strategy.

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During Voir Dire

Having knowledge of the jurisdiction's rules and the trial judge's preferences will also be helpful during voir dire of the jury panel. For example, the standard for dismissal of a potential juror for cause varies from jurisdiction to jurisdiction. Some jurisdictions require a potential juror to state his or her inability to be fair and impartial using key language. A junior lawyer can add value during selection by knowing these jurisdictional quirks and reminding the lawyer conducting the voir dire of the need to elicit the key language from troublesome jurors so that the trial team can make a successful challenge for cause.

In addition to knowing the rules, a junior lawyer can also add value during voir dire of the panel by knowing the facts of the case cold. Depending on the size of the case, oftentimes there may be multiple fact and expert witnesses listed to testify. Knowing who these witnesses are—and how large a role they will play at trial—will help the lawyer spot any conflicts that a potential juror may have if he or she is familiar with a witness in the case. Additionally, knowing the case themes will aid in identifying favorable or unfavorable opinions that should be discovered during selection.

During Selection

Although the length of time that parties may have to conduct voir dire of a juror panel varies by jurisdiction, the selection process itself tends to move quickly. During this process, a junior lawyer can add value by having detailed notes of the answers given by potential jurors during voir dire. The notes should be organized in such a way that the potential jurors with unfavorable opinions can be quickly identified to trigger the use of a peremptory strike. Having a well-organized system for note-taking—whether it is a chart or involves sticky notes—will help ensure that none of the important details are lost and are at the lawyer's fingertips during selection.

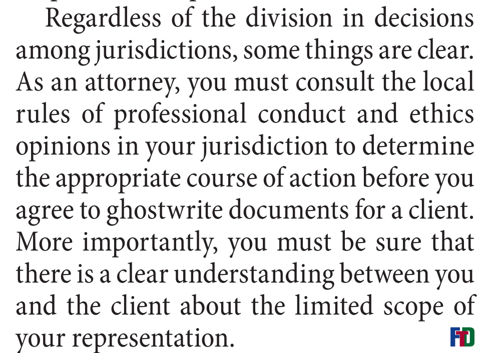
Conclusion

Selecting a strong jury that will be receptive to defense themes and ultimately deliver a defense verdict is a team effort. Whether jury selection takes three hours or three

Raising the Bar, continued on page 74

how state bar associations see ghostwriting and how federal courts view it. For example, a bankruptcy court in South Carolina held that "an attorney's practice of 'ghostwriting' pleadings for 'pro se' individuals violates the local bankruptcy rules, the Federal Rules of Civil Procedure, and the South Carolina Rules of Professional Conduct." *In re Mungo*, 305 B.R. 762 (Bankr. D. S.C. 2003). The court considered ghostwriting to be "a deliberate evasion of a bar member's obligations." *Id*.

Federal Rule of Civil Procedure 11 requires counsel to sign all documents submitted the court representing that there are legitimate grounds upon which the filing is based. Fed. R. Civ. P. 11(a). Ghostwriting shields attorneys by "cloak[ing] them in anonymity." *In re Mungo*, 305 B.R. at 768. As pointed out by the *Mungo* court, "[a]n obvious result of the anonymity afforded ghost-writing attorneys is that they cannot be policed pursuant to the applicable ethical, professional, and substantive rules enforced by the Court and members of the bar since no other party to the existing litigation is aware of the ghost-writing attorney's existence." *In re Mungo*, 305 B.R. 762, 768 (Bankr. D. S.C. 2003) (citing *Barnett v. LeMaster*, 12 Fed. App'x 774, 778 (10th Cir. 2001); *Ellis v. State of Maine*, 448 F.2d 1325, 1328 (1st Cir. 1971)). In these jurisdictions, attorneys are subject to sanctions such as suspension and possible disbarment.



Regardless of the division in decisions among jurisdictions, some things are clear. As an attorney, you must consult the local rules of professional conduct and ethics opinions in your jurisdiction to determine the appropriate course of action before you agree to ghostwrite documents for a client. More importantly, you must be sure that there is a clear understanding between you and the client about the limited scope of your representation.

Lincoln, from page 55

today. We are most persuasive when we are concise, use simple, easy to understand metaphors, and avoid formalistic legalese. Lincoln developed and refined these traits during his 25 years practicing law, and he used them effectively as president during the most trying time in our country's history.

Do Not Procrastinate

"The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for to-morrow which can be done to-day. Never let your correspondence fall behind." 2 Abraham Lincoln, Notes for a Law Lecture (July 1, 1850), in *The Collected Works of Abraham Lincoln*, 81 (Roy P. Basler., ed., 2001).

Lincoln would not have been proud of how long I put off writing this column. Lincoln's time management advice, however, is as relevant today as it was 165 years ago. Lincoln did not have to deal with the instant communication that modern technology demands, but even in the mid-nineteenth century Lincoln knew the importance of timely responding to correspondence, and not putting off until tomorrow what can be done today. I just wonder how Lincoln would have managed the hundreds of emails that I get each day.

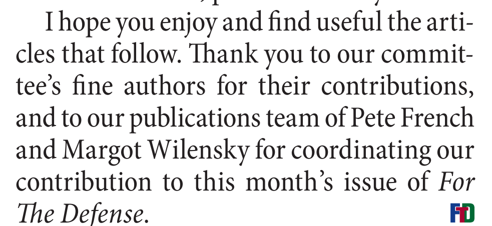
Use Humor Effectively

Lincoln used humor to make a political point, sway opinion, and sustain morale during the war. *New York Tribune* correspondent Henry Villard observed that Lincoln had a remarkable ability to "tell a humorous story or deliver an appropriate anecdote 'to explain a meaning or enforce a point, the aptness of which was always perfect.'" Doris K. Goodwin, *Team of Rivals: The Political Genius of Abraham Lincoln*, 536 (2005). Lincoln had "a kind word, an encouraging smile, a humorous remark for nearly everyone that seeks his presence." *Id*. at 537.

Lincoln's humor was often self-deprecating. During the Lincoln–Douglas debates, when Douglas accused Lincoln of being two-faced, Lincoln replied, referring to his homeliness, "Honestly, if I were two-faced, would I be showing you this one?" Robert Mankoff, *Lincoln's Smile*, http://www.newyorker.com. During an 1848 speech before Congress, Lincoln noted that he was a "military hero" in the Black Hawk War. While he never saw any live, fighting Indians, he "had a good many bloody struggles with the mosquitoes, and although I never fainted from the loss of blood, I can truly say I was often very hungry." 1 Abraham Lincoln, Speech in the US House of Representatives on the Presidential Question (July 27, 1848), in *The Collected Works of Abraham Lincoln*, 510 (Roy P. Basler., ed., 2001).

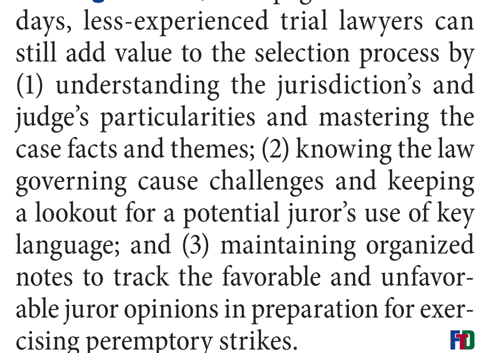
Appropriate use of humor can be just as effective today as it was for Lincoln in the nineteenth century. The adversarial system often makes humor difficult. Our cases often involve contentious discovery, substantial financial exposure to our clients, and great human suffering. Appropriate use of humor can ingratiate us to jurors, diffuse tense situations, and illustrate or drive home a point to a judge or jury.

We should all study, imitate, and learn from Abraham Lincoln. Brevity, clarity, and humor are as effective today as they were for Lincoln over a century and a half ago. If we follow Lincoln's example, we will be more effective, productive lawyers.



I hope you enjoy and find useful the articles that follow. Thank you to our committee's fine authors for their contributions, and to our publications team of Pete French and Margot Wilensky for coordinating our contribution to this month's issue of *For The Defense*.

Raising the Bar, from page 72



days, less-experienced trial lawyers can still add value to the selection process by (1) understanding the jurisdiction's and judge's particularities and mastering the case facts and themes; (2) knowing the law governing cause challenges and keeping a lookout for a potential juror's use of key language; and (3) maintaining organized notes to track the favorable and unfavorable juror opinions in preparation for exercising peremptory strikes.